Unveiling the Real Issue: Evaluating the European Court of Human Rights’ Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey

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NOTE

UNVEILING THE REAL ISSUE: EVALUATING THE EUROPEAN COURT OF HUMAN RIGHTS’ DECISION TO ENFORCE THE TURKISH HEADSCARF BAN IN LEYLA ŞAHİN V. TURKEY

Benjamin D. Bleiberg†

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INTRODUCTION

After the atrocities of the Second World War, Europe realized that individual states could not be trusted to protect the rights and freedoms of their citizens.1 In response, various organizations and charters—including the Council of Europe and European Convention on Human Rights (Convention)2—aimed to protect human rights and fundamental freedoms on the supranational level.3 The Convention protects individuals from the actions of their own states by providing an extensive list of rights and freedoms.4 To enforce these individual rights and freedoms, the Convention established the European Court of Human Rights (ECHR).5 But in Leyla Şahin v. Turkey,6 seven judges sitting on the ECHR delivered a crushing blow that potentially destroys the efforts made by countless treaties to protect an individual’s right to free exercise of religion, expression, education, and gender equality.7

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3 See id.; see also L.J. Clements, European Human Rights: Taking a Case Under the Convention 2–4 (1994) (noting that part of the Council’s objective was to promote European political unity and to protect human rights). Other non-European organizations and charters created after the Second World War with this purpose in mind obviously include the United Nations and the nonbinding Universal Declaration of Human Rights. See Clements, supra, at 1–2.
4 See Convention, supra note 2, § 1.
7 See discussion infra Part III.
In Şahin, the ECHR upheld a Turkish Constitutional Court ruling that approved a ban on head coverings and other forms of religious attire—including headscarves worn as a manifestation of Islamic faith—in Turkish universities.⁸ Leyla Şahin, a fifth-year medical student at the University of Istanbul, was only one of the tens of thousands of students who were faced with an uncomfortable choice as a result of the ban: to abandon her religious convictions for the opportunity to complete her last few months of medical education or to manifest her religious beliefs and be banned from the university.⁹

The decision of the ECHR to uphold this headscarf ban in Şahin was incorrectly reasoned. But more importantly, the fallout of the decision in both Turkey and other European countries will be enormous. Şahin is particularly damaging to the rights of women who practice traditional Islam in Turkey—those who wear a headscarf out of a sense of personal religious obligation. Because they must choose between access to public education and expressing their religious convictions, those devout Turkish Muslim women who choose to wear the headscarf—and admittedly those who are forced to wear it—will be denied educational opportunities.

The Şahin decision also proclaims the victory and legitimization of "secularism"¹⁰ in the battle against Islamic fundamentalism. But in reality, it approves of the continuous threats of the Turkish military to intervene in the democratically elected Turkish government when the military believes Turkish secularism is in danger. Turkey has struggled to attain and maintain its democratic identity since Mustafa Kemal Atatürk reformed the country’s legal system in the 1920s.¹¹ Since Atatürk’s reforms, the Turkish government, de facto led by its influential military, has battled to suppress the influence of fundamentalist Islamic groups and political organizations that threaten to overthrow Turkey’s supposed democratic and secular system and return Turkey to Sharia-based rule.¹² As part of the military plan to suppress these extremist groups, the government spearheaded efforts to ban the Islamic headscarf from state institutions, including universities.¹³

Although Şahin was not the Court’s first attempt to limit the application of the religious freedoms protected by Article 9 of the Con-

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⁸ Şahin, No. 44774/98.
⁹ See discussion infra Part II.A.
¹⁰ See infra Part II.
¹³ See discussion infra Part I.B.
vention,\textsuperscript{14} it represents the most far-reaching impediment to personal freedoms and rights the Court has imposed to date. Significantly, because the ruling court was not a national court, but rather an international court, its decision has binding and precedential effect on all states that are signatories to the Convention, and thus will affect other countries that are currently involved in their own versions of the headscarf debate, such as France and Germany.\textsuperscript{15} Although Turkey and other European nations with religious-dress bans have different histories, constitutions, and laws, as well as religious-symbol bans of varying degrees of permissiveness, the $\text{\c{s}ahin}$ decision will likely influence subsequent national court decisions on the topic. Perhaps more significantly, the decision may give carte blanche to any of the forty-plus signatories of the Convention to promulgate similar laws that on their faces merely hinder religious expression, but on a much deeper level discriminate against minority groups, deny equal opportunities to women, and potentially limit access to education.

Part I of this Note discusses the historical conflict between Turkey's secularists and Islamists concerning the manifestation of religious belief in a constitutionally secular Turkish society and examines Turkey's Constitution and religious statutes. Part II details the background of $\text{\c{s}ahin}$ and the reasoning behind the ECHR's decision to uphold the Turkish headscarf ban. Part III analyzes the ECHR's decision, first criticizing the ECHR for deferring too much to the Turkish Constitutional Court in making its own determination about the legality of the ban, and then attacking the ECHR's reasoning as politically motivated by its own Eurocentric concept of the Islamic headscarf and its fears concerning fundamentalist and extremist Islam.

I

THE RELIGIOUS CONFLICT IN SECULAR TURKEY

According to a textbook distributed by the Turkish government to third-grade students, a secular country is defined by five criteria: (1) affairs of the state and religion are kept separate; (2) freedom of worship, belief, and conscience is protected, but fanaticism is never tolerated; (3) extremist movements are avoided; (4) no one may force any person to embrace a religion or sect; and (5) the use of religion for personal gain is not permitted.\textsuperscript{16} Respect for these criteria permeates Turkish society; they are often expressed on any occasion when the name Mustafa Kemal Atatürk is mentioned—during school func-

\textsuperscript{15} See generally Axel Frhr. von Campenhausen, The German Headscarf Debate, 2004 BYU L. Rev. 665 (discussing the German and French debates).
\textsuperscript{16} DAVID SHANKLAND, ISLAM AND SOCIETY IN TURKEY 24–25 (1999).
tions, on formal religious holidays, and in political speeches. Atatürk receives this reverence because Turkey attributes its modern and so-called "secular" democratic government to the drastic changes he made to Turkish society and government after liberating Turkey from the foreign occupiers who had invaded after the collapse of the Ottoman Empire. But the interpretation of these criteria—and of secularism itself—can vary greatly. The following sections of this Note detail the evolution of Atatürk's postrevolution religious restrictions and the conflict among various factions of the Turkish political spectrum concerning religious practice and the definition of a secular democracy in a country that is ninety-nine percent Muslim.

A. Atatürk's "Secular" Turkey

1. Religious Restriction in Atatürk's Secular Turkey

Atatürk, the founding father and first president of modern Turkey, believed that Western culture, with its greater technological and economic development, was superior to Islamic culture. This view prompted him to implement radical reforms that he believed would immediately modernize Turkey and make it competitive with the West. In contrast to the Ottoman Empire, in which the central government was significantly entangled with Islam, Atatürk engaged in a "scorched-earth campaign against religious power" that not only destroyed Turkey's previous entanglement with Islam, but, to the oppo-
site extreme, also significantly restricted an individual's ability to practice the religion.\textsuperscript{23} Atatürk was determined to modernize Turkey, and to Atatürk this meant removing Islam's influence on society.\textsuperscript{24} Atatürk called his modernization process "secularism"; later it became known as Kemalism.\textsuperscript{25}

The Grand National Assembly drafted the first constitution of Atatürk's Turkish Republic in 1921, proclaiming the principle of "national sovereignty" and emphasizing a Turkish national identity instead of a religious one.\textsuperscript{26} Interestingly, while Turkey's second, majoritarian constitution proclaimed in 1924 that "the religion of the Turkish state is Islam,"\textsuperscript{27} a 1928 constitutional amendment deleted this clause.\textsuperscript{28} A 1937 amendment finally constitutionalized the Turkish cornerstone principle of secularism.\textsuperscript{29}

Atatürk further targeted the institutional framework of Islam through a complete statutory overhaul. In 1924, Turkey abolished the caliphate and in 1926 officially abandoned the Sharia rule of the old Ottoman regime.\textsuperscript{30} Under the Education Services (Merger) Act of March 1924, the Ministry of Education assumed control of all schools, and religious schools were closed.\textsuperscript{31} In 1935, the government abolished religious study from the primary and secondary school curricula.\textsuperscript{32}

Atatürk's religious reform further curtailed the use of Islamic symbols and personal religious expression. A 1923 decree on dress was the first governmental action that regulated clothing.\textsuperscript{33} Subsequently, the Hat Law of 1925 banned the fez and required men to

\textsuperscript{23} KINZER, supra note 20, at 61.

\textsuperscript{24} See generally Kucukcan, supra note 22, at 485-89 (noting that Atatürk aimed to modernize Turkey by reducing Islamic influence in three ways: (1) by limiting the symbolic use of Islam; (2) by removing Islam's institutional hold over politics and the government; and (3) by replacing the Islamic legal and educational systems with Western-style systems).

\textsuperscript{25} See Dökupil, supra note 20, at 65.

\textsuperscript{26} See Ergun Özbudun, Constitutional Law, in INTRODUCTION TO TURKISH LAW 19, 21 (Tugrul Ansay & Don Wallace, Jr. eds., 1996).

\textsuperscript{27} ELISABETH ÖZDALGA, THE VEILING ISSUE, OFFICIAL SECULARISM AND POPULAR ISLAM IN MODERN TURKEY 19, 22 (1998); see Özbudun, supra note 26, at 21. According to the majoritarian concept of democracy, sovereignty is the general, or majority, will of the people and is "absolute, indivisible, and infallible." Özbudun, supra note 26, at 21. The 1924 Constitution had no system of checks and balances. Id.

\textsuperscript{28} ÖZDALGA, supra note 27, at 19.


\textsuperscript{30} See NIYAZI BERKES, THE DEVELOPMENT OF SECULARISM IN TURKEY 467-73 (1964).

\textsuperscript{31} Şahin, No. 44774/98, para. 30.

\textsuperscript{32} ÖZDALGA, supra note 27, at 20.

wear a modern type of felt hat. And in 1934, the Dress (Regulations) Act banned all religious attire other than in places of worship and set specific guidelines for the proper dress for students and state employees.

Notably, none of the acts Atatürk introduced reference women’s clothing—including the Islamic headscarf. While Atatürk’s policies may have strongly discouraged the headscarf, “in a bow to custom” he never outlawed it. In fact, Atatürk himself took a relaxed position concerning the headscarf, often taking pictures for official public business with his first wife, who wore a headscarf in public. Atatürk once wrote, “The religious covering of women will not cause difficulty... This simple style [of headcovering] is not in conflict with the morals and manners of our society.” Thus, in the working-class neighborhoods of smaller cities and the countryside, most women continued to cover their heads.

2. Religious Tolerance and the Birth of Political Islam

Atatürk’s death and his successor’s unpopularity heralded the end of a one-party Turkey and the birth of a multiparty system in 1946, in which each party had its own definition of secularism and policies regarding religious expression. Under Turkey’s new multiparty system, politicians and government officials began using religion as a political tool to consolidate and expand electoral support. Even during Atatürk’s revolution, many of his own supporters believed that the nationalist movement was a war “for Islam against the unbeliever rather than for Turkey against the foreigner.” Without Atatürk, politicians took the opportunity to moderate his extreme form of secularism. Atatürk’s own Republican People’s Party began to ease the restrictions many of his antireligious statutes had imposed. For example, the government allowed private religious schools to op-

34 See id.; Özdalga, supra note 27, at 41 (referring to the law as the well-known “Sapka Kanunü”).
37 See Jenny B. White, Islamist Mobilization in Turkey 35 (2002). Although the headscarf was not outlawed, White asserts that “those covering their heads found no place in the banks, ministries, and schools of the new nation.” Id.
38 Human Rights Watch, supra note 33, at 26.
39 Id. (alterations in original) (quoting 1 Atatürkism 126 (1982)).
40 White, supra note 37, at 35.
41 See Pope & Pope, supra note 18, at 72; Dokupil, supra note 20, at 71; see also Mehmet Yaşar Gevikacı, Political Parties in Turkey: The Role of Islam 69–70 (1984) (discussing the varying attitudes of different political parties to religion after the adoption of the multiparty system).
42 See Pope & Pope, supra note 18, at 318.
44 See Kinzer, supra note 20, at 62.
erate again by 1947. By 1948, religion classes were reintroduced in primary and secondary schools, and the government subsequently authorized the opening of schools to train imams and a theology department at the University of Ankara.

When the Democrat Party (DP) gained control in 1950, the easing of religious restrictions continued, as an increasing number of Turks made the pilgrimage to Mecca, mosque attendance rose, and more women began to wear headscarves. Eventually, the government actually made Islamic religious instruction in public schools mandatory. But in 1953, after a series of religiously motivated violent acts by conservative Islamists, the DP passed the Law to Protect the Freedom of Conscience, which penalized the use of religion for political purposes.

Despite this new law, as the Turkish economy worsened and the regime’s popularity declined, the DP increasingly reversed its previous stance and attempted to appeal to Islamic sympathies for support. In 1960, the military staged a successful coup against the DP government. Surprisingly, instead of being antagonistic towards Islam and returning the country to Atatürk-style secularism, the new government continued to recognize Islam as an important part of the Turkish identity. In 1961, the government drafted a new, pluralistic constitution, which in addition to establishing a Constitutional Court with judicial review powers, provided for “freedom of religious faith and worship and freedom from abuse of one’s religion by others.” It also “stipulated that [Turkish] law could not infringe upon the essence of any right or liberty.”

Throughout the 1960s, Turkish politicians increasingly appealed to Islamic sensibilities in order to gain electoral support. By 1970,
both major political parties, Süleyman Demirel’s Justice Party and Bülent Ecevit’s Republican People’s Party, had adopted a moderate stance on religion. But further social and economic distress prompted a second military coup in 1971, and with it the birth of the influence of political Islam in Turkish politics. Necmettin Erbakan’s National Salvation Party (NSP), which can perhaps best be described as Turkey’s Islamic party, became the significant third-party player in Turkish coalition governments until its dissolution in 1980. Initially expressing more moderate religious beliefs, Erbakan soon began to openly campaign against Kemalist secularism, advocating instead a fundamentalist view of Islam. Despite the NSP’s philosophy that Islam and secularism could not coexist, Erbakan never actually called for an Islamic state in Turkey.

B. The Turkish Army’s “Secular” Turkey

1. The Coup and Constitution

By the end of the 1970s, political polarization, religiously motivated violence, and rampant terrorism plunged Turkey into a state of crisis and instability. Claiming that Turkish law made it the army’s duty to protect the Republic, the military seized control of the government a third time in a bloodless coup in 1980, this time led by General Kenan Evren. To lead the newly vacant government, Evren established the National Security Council (NSC), which, under Evren’s control, abolished the Grand National Assembly and banned all political parties and politicians that were active before the military

59 See id. at 78–79.
60 Id. at 80.
61 See id. at 118 (describing “political Islam” as religious “interference” in politics and state affairs).
62 Erbakan officially or unofficially led various versions of his first political party, the National Order Party (NOP), each with the common theme of using, to varying degrees, traditional Islamic symbols to gain electoral support and to reestablish a stronger connection between Turkey and its Islamic past. See id. at 81–85.
63 See id. at 80–81.
64 See id. at 86–87.
65 See id. at 87. Despite the NSP’s political move not to openly call for a return to a Sharia form of government in Turkey and subsequent loss of popularity, secularists were still worried about the party’s radical religious views. See id. at 92.
66 See Özbudun, supra note 26, at 24. Much of the violence was religiously motivated: Fundamentalist Islamists violently attacked and terrorized establishments that they considered counter to Islam and the Koran. See Kinzer, supra note 20, at 65, for examples of violent incidents before the coup.
67 Pope & Pope, supra note 18, at 141–42. The army met absolutely no resistance in its attempt to take control of the crisis-ridden government. See id. Not only did the Turkish press and commentators welcome the coup, so did some politicians, who even went so far as to congratulate Evren on his success. See id. at 142–43. “[M]ilitants on both sides seemed to give up, almost with relief, as if a referee had blown a whistle.” Id. at 141.
The NSC further amended the 1961 Constitution to grant itself more power and legal immunity. It quickly passed the Law on the Constitutional Order, which provided the NSC power to amend the 1961 Constitution simply through the NSC's own laws, declarations, and decisions, and declared that none of the NSC's actions could be found unconstitutional. Most significantly, the NSC passed the Law on the Constituent Assembly, which provided for the creation of a new constitution. According to Evren, "The 1961 constitution was too loose a garment . . . . We have to sacrifice some personal rights for the security of the community . . . ."72

The military's 1982 Constitution claimed to herald a return to the "nationalism of Atatürk." Historians Nicole and Hugh Pope assert that due to the "ever-present Turkish fear of separatism" from fundamentalist Islamic groups, the drafters of the 1982 Constitution focused on the protection of the indivisibility of the state. Indeed, the Constitution contains more than fourteen references to this national interest. The Constitution's chief architect, Orhan Aldikaçtı, professed, "We have built an armoured wall against those who want to split our country." The Constitution declares Turkey "a democratic, secular and social state governed by the rule of law; . . . loyal to the nationalism of Atatürk." Yet secularism is never defined. Seemingly inspired by the fear of religious violence and the fundamentalist movement's call for a return to an Islamic state, the NSC included a provision prohibiting the amendment of the constitutional provisions establishing the form of the republic and its essential characteristics—including its indivisibility and secularism.

While the 1982 Constitution ostensibly grants numerous rights and civil liberties, it simultaneously contains provisions that the government could arguably use to restrict religious liberty in the name of safeguarding the republic's interests. For example, Article 10 discusses the principles of equality in the Turkish Republic: "All individuals are equal without any discrimination before the law, irrespective of

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68 See Özbudun, supra note 26, at 24. The NSC originally consisted of the Chief of the General Staff (who was Evren at the time) and the Commanders of the Army, Navy, Air Force, and Gendarmerie. Id. A 1995 constitutional amendment repealed the ban on political parties. See id. at 25.
69 See id. at 24–25.
70 See id. at 24.
71 See id. at 25 & n.4.
72 POPE & POPE, supra note 18, at 148.
74 POPE & POPE, supra note 18, at 149.
75 Id. at 150.
76 TURK. CONST. art. 2 (emphasis added).
77 See id. art. 4.
language, race, colour, sex, political opinion, philosophical belief, re-
ligion and sect, or any such considerations.”

But the Article goes on to limit this proclamation of nondiscrimination: “No privilege shall be granted to any individual, family, group or class.” The meaning of “privilege” is never defined.

Similarly, Article 24 grants the public the “right to freedom of conscience, religious belief and conviction.” However, these freedoms are limited as well: Religious activity and expression cannot endanger the indivisibility or secularism of the republic. Nor can anyone “exploit or abuse religion” or religious symbols for any political purpose or cause state affairs “to be based on religious precepts, even if only in part.” By not defining critical terms, such as “exploit or abuse religion,” the drafters implicitly granted the interpretive branch of the government the power to define the parameters of these limitations.

The limitations in Article 14 are similarly vague and susceptible to politicized interpretation, and have the potential to drastically limit freedom of religious expression:

None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights.

No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.

Thus, the seemingly long list of guaranteed freedoms are actually tempered by caveats and restrictions capable of completely eliminating the freedoms. Pope and Pope cynically summarize these “partial freedoms”:

‘No one shall be required to perform forced labour’, except when ordered to do so by the government. ‘Everyone has the right to freedom of residence and movement’, but the government may decide to the contrary for reasons including social, economic and urban

78 Id. art. 10 (amended 2004).
79 Id.; see Leyla Şahin v. Turkey, No. 44774/98, para. 94 (Eur. Ct. H.R. June 29, 2004), http://cmissp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by Application Number) (describing Turkey’s argument that recognizing a right to wear headscarves was “tantamount to claiming a privilege for a religion”).
80 TURK. CONST. art. 24.
82 Id. art. 24.
83 Id. art. 14 (amended 2001).
development. . . . 'Everyone has the right to freedom of thought and opinion', but not, of course, if this conflicts with the preamble's vague 'determination that no protection shall be afforded to thoughts or opinions contrary to Turkish national interests.'

2. The NCS's Assault on the Headscarf

Elected President in the same election that ratified the 1982 Constitution, Evren and the constitutionalized NSC immediately began to reverse the liberalization of the dress regulations implemented after Atatürk's death. New NSC-sponsored regulations specifically banned the headscarf for the first time since Atatürk founded his modern republic. In 1981, the Regulation Concerning the Dress of Students and Staff in Schools prohibited wearing any type of headscarf by requiring staff at public organizations and institutions to wear "ordinary, sober, modern dress." A year later, under pressure from the NSC, the Higher Education Council (HEC) banned Islamic headscarves in lecture rooms. Two years later, the Supreme Administrative Court (Danışta) upheld these HEC regulations, describing the headscarf as a symbol of views that are contrary to the ideals of secularism and women's equality.

Pressure from the different Islamic groups, however, led the HEC to ease these restrictions, and in 1984 it allowed students to wear

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84 Pope & Pope, supra note 18, at 148–49 (quoting Turk. Const. arts. 18, 23, 25 & pmbl.).
85 See id. at 150.
86 Turk. Const. art. 118. The new NSC consists of the senior generals and the most important ministers. See id. "Most of Turkey's strategic decisions have been taken at [the NSC's] monthly meetings, . . . under the chairmanship of the president of the republic." Pope & Pope, supra note 18, at 150.
88 Özdalga, supra note 27, at 41.
89 See Şahin, No. 44774/98, para. 34. Not surprisingly, the President appoints the members of the HEC. See Turk. Const. art. 131 (amended 2004). The HEC is alternatively known as the Higher Education Authority, the Council of Higher Education, and the Yüksek Öğretim Kurulu (YÖK). See id.; Şahin, No. 44774/98, para. 34; Özdalga, supra note 27, at 41.
90 See Şahin, No. 44774/98, para. 34. The Danışta is Turkey's highest administrative court, also referred to as the Council of State, and deals with governmental action and general administrative disputes. See TurkishEmbassy.org, Republic of Turkey, The Administrative Courts and the Council of State, http://www.turkishembassy.org/governmentpolitics/politicstjudicature.htm (last visited Aug. 29, 2005). As the highest administrative court, it is the final court for cases under its own jurisdiction. Id. It is also the highest consultative body of the state, expressing its opinions on draft legislation when the Prime Minister and the Council of Ministers request it to do so. Id.
headscarves that were in line with "contemporary clothing." By the end of 1986, Evren sent a warning to the HEC about the "increasing influence of 'reactionary tendencies,'" particularly in universities. In response, the HEC issued new, more stringent dress regulations, which despite their apparent restriction on religious expression, were loose enough to support very different interpretations. This interpretive flexibility led individual Turkish universities to implement the regulation differently: Some universities, and even departments within the same universities, allowed the headscarf, while others prohibited it.

In 1987, Prime Minister Turgut Özal, leader of the Motherland Party (ANAP), and the board of university presidents attempted to gradually lift any remaining prohibition on headscarves. Parliament accepted the ANAP-proposed law to lift the ban, but Evren used his presidential veto to prevent Parliament from enacting it. In response to the veto, the ANAP and Parliament passed an amnesty law to allow students who had previously been expelled from universities for wearing headscarves to resume their educations. Instead of vetoing this second law, Evren brought the issue to the Turkish Constitutional Court, which ruled against the amnesty law.

The Turkish government subsequently passed section 16 of the Higher Education Act in 1988 in an attempt to relax the Constitutional Court's restrictions by expressly providing that "[a] veil or headscarf covering the neck and hair may be worn out of religious conviction" in certain establishments, including higher-education institutions. The Constitutional Court responded by finding that section 16 violated the constitutional principles of secularism, equality before the law, and, oddly, freedom of religion. According to the Constitutional Court, secularism is "an essential condition for democracy," and although freedom of religion guarantees the right to decide whether to follow any religion, that freedom does not confer an

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91 See ÖZDALGA, supra note 27, at 41–42. The HEC essentially banned the big headscarf that covered the shoulders, but allowed the türban, which tied at the back of the head and did not cover the shoulders. See id. at 42.
92 Id. at 43.
93 Id.
94 Id.
95 Id. at 45–46. The attempt was to lift the ban on the more contemporary type of headscarves: the türban and başörtü.
96 Id. at 46.
97 Id.
98 Id. It should come as no surprise that the President appoints the members of the Constitutional Court. See TURK. CONST. art. 104.
100 Id. para. 36.
absolute right to wear whatever religious attire one desires. Section 16's main constitutional difficulty was that it granted "legal recognition to a religious symbol." The Constitutional Court reasoned that states must be neutral because this kind of "religious affirmation" has the potential to violate a student's right to study in a "tolerant and mutually supportive atmosphere."

Interestingly, this time the Danistay upheld the headscarf regulation based on basic individual liberties granted by the Constitution. Thus, a contradiction arose between the decisions of two different Turkish high courts, resulting in "a true impasse: neither a clear yes, nor a clear no, but bifurcation and ambivalence."

Section 17 of the Higher Education Act formed another attempt to circumvent the Constitutional Court's holding. Requiring that "choice of dress shall be free in higher-education institutions provided that it does not contravene the laws in force," the section's vague wording allowed for an open interpretation and served to prevent any recognition or affirmation of any one religion. In a subsequent ruling in 1991, the Constitutional Court upheld section 17, despite noting in dicta that "[i]n higher-education institutions, it is contrary to the principles of secularism and equality for the neck and hair to be covered with a veil or headscarf on grounds of religious belief." The Constitutional Court reasoned that because it had previously struck down a regulation that permitted headscarves, Turkish law no longer permitted headscarves to be worn in universities and therefore section 17 did not violate the Constitutional Court's judge-made law.

A 1999 Constitutional Court judgment stated, "The legislature and executive are bound by both the operative provisions of [the Court's] judgments and the reasoning taken as a whole." Furthermore, legislative activity must be measured against and guided by these judgments. The Constitutional Court thus essentially proclaimed that its own dicta can bind other Turkish courts when those courts review legislative and executive action. Therefore, because the Constitutional Court previously mentioned in a judgment that wear-

101 Id.
102 Id.
103 Id.
104 See ÖZDALGA, supra note 27, at 46.
105 Id.
106 See Şahin, No. 44774/98, para. 37.
107 Id.
108 See id.
109 See id. para. 38.
110 Id.
111 Id. para. 52.
112 Id.
ing headscarves in public universities is contrary to the constitutional principle of secularism, the legislature and executive are now prohibited from enacting any legislation that would contradict this conclusion.\textsuperscript{113}

II

\textbf{LEYLA ŞAHİN V. TURKEY: THE TURKISH HEADSCARF CASE}

A. Background Facts of Şahin

In February 1998, in accordance with section 13 of the Higher Education Act,\textsuperscript{114} the Vice-Chancellor of Istanbul University issued a circular providing that any “students whose 'heads are covered' (wearing the Islamic headscarf) . . . must not be admitted to lectures, courses or tutorials.”\textsuperscript{115} Specifically singling out all women who wear the Islamic headscarf,\textsuperscript{116} the circular instructs university officials to prohibit these students from registering and from entering the university, exam rooms, or lecture halls.\textsuperscript{117} The circular further provides that if a woman wearing a headscarf tries to enter a classroom, the teacher must first inform her of the ban on head coverings and then ask her to remove her headscarf or leave.\textsuperscript{118} The circular further suggests that the teacher should not deliver the planned lecture to the class if the student does not comply.\textsuperscript{119} If the student insists on wearing her headscarf, she may be suspended or expelled from the university.\textsuperscript{120}

One month after the Vice-Chancellor issued the circular, the University of Istanbul barred Leyla Şahin, a fifth-year medical student, from taking one of her written exams because she refused to remove her headscarf.\textsuperscript{121} Şahin comes from a traditional Muslim family from Istanbul and considers it her religious duty to wear the Islamic headscarf.\textsuperscript{122} Prior to the issuance of the circular, there were no violent

\begin{itemize}
\item \textsuperscript{113} See id. para. 78.
\item \textsuperscript{114} Id. para. 50.
\item \textsuperscript{115} Id. para. 12. According to the Istanbul Administrative Court, section 13(b) of the Higher Education Act grants the Vice-Chancellor, as the executive manager of the university under article 130 of the Turkish Constitution, the power to issue regulations and take individual measures to maintain order. See id. paras. 15, 50–51.
\item \textsuperscript{116} The circular’s ban applies to men with beards as well, but the Islamic headscarf is the only head covering the circular addresses. See id. para. 12.
\item \textsuperscript{117} See id.; \textit{HUMAN RIGHTS WATCH}, supra note 33, at 29.
\item \textsuperscript{118} See Şahin, No. 44774/98, para. 12.
\item \textsuperscript{119} See id.
\item \textsuperscript{120} \textit{HUMAN RIGHTS WATCH}, supra note 33, at 29.
\item \textsuperscript{122} Şahin, No. 44774/98, para. 10.
\end{itemize}
incidents or disruptions related to Şahin’s headscarf at the University of Istanbul or at the University of Bursa, where Şahin had previously studied for four years.\textsuperscript{123}

In May 1998, the University of Istanbul instituted disciplinary action against Şahin because she continued to defy the ban.\textsuperscript{124} Two months later, Şahin filed a complaint with the Istanbul Administrative Court challenging the legality of the university’s dress regulation under the Convention.\textsuperscript{125} The court ruled that the university’s dress regulation was lawful based on the precedent of the Constitutional Court and the Supreme Administrative Court.\textsuperscript{126} The following year the university prevented Şahin from registering.\textsuperscript{127}

Şahin also brought several claims to the ECHR.\textsuperscript{128} First, she claimed that Turkey’s ban on the Islamic headscarf in universities interferes with her right to freedom of religion and thus violates Article 9 of the Convention.\textsuperscript{129} According to Şahin, the headscarf ban prevents her from manifesting her religion through the practice of wearing the Islamic headscarf, a practice protected by Article 9.\textsuperscript{130} Şahin further claimed that the ban violates Article 14, taken together with Article 9,\textsuperscript{131} because the university discriminates against students based on their religious beliefs and forces students to choose between education and religion.\textsuperscript{132} Similarly, she argued that the headscarf ban interferes with her right to education under Article 2 of Protocol

\begin{footnotes}
\footnotetext[123]{See id. para. 86.}
\footnotetext[124]{Id. para. 17. Two disciplinary actions were taken against Şahin: One concerned the issue of her refusal to remove her headscarf in the university and resulted in only a warning. See id. paras. 17–18. The second concerned her involvement in an unauthorized protest against the circular’s headscarf ban in February 1999 and resulted in her suspension from the university. See id. paras. 19–20. All disciplinary penalties were ultimately annulled under Law No. 4584 of June 28, 2000. See id. para. 24; ECHR Press Release, supra note 121.}
\footnotetext[125]{Şahin, No. 44774/98, para. 14.}
\footnotetext[126]{Id. para. 15. The Supreme Administrative Court dismissed Şahin’s appeal in April 2001. See id. para. 16.}
\footnotetext[127]{Jean-Yves Gilg, ECtHR Upholds Muslim Headscarf Ban, THELAWYER.COM, June 29, 2004, http://lawzone.thelawyer.com/cgi-bin/item.cgi?id=110678&d=205&h=207&f=259.}
\footnotetext[128]{Şahin originally applied for relief in July 1998 to the now defunct European Commission of Human Rights; the ECHR ultimately accepted the claim almost four years later. Şahin, No. 44774/98, paras. 1, 6.}
\footnotetext[129]{Id. para. 64.}
\footnotetext[130]{According to Article 9 of the Convention:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Convention, supra note 2, art. 9(1).}
\footnotetext[131]{See Convention, supra note 2, art. 14 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."); Şahin, No. 44774/98, para. 33.}
\footnotetext[132]{See ECHR Press Release, supra note 121.}
\end{footnotes}
No. 1 of the Convention, because her choice to adhere to her religious beliefs prevented her from completing her medical studies. Lastly, Şahin claimed that the ban also violates her rights under Articles 8 and 10 because the ban prevents her from expressing her beliefs.

B. The ECHR’s Reasoning in Şahin

On June 29, 2004, the ECHR upheld the Turkish headscarf ban, finding that the ban does not violate Article 9. The ECHR did not address Şahin’s claims under Articles 8, 10, or 14 of the Convention or Article 2 of Protocol No. 1, reasoning that “the relevant circumstances are the same as those it examined in relation to Article 9.” While the court acknowledged that the Article 9 freedoms of thought, conscience, and most specifically religion are “foundations of a ‘democratic society’” and a “precious asset,” it maintained that “Article 9 does not protect every act motivated or inspired by a religion or belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief.” Instead, Article 9 protection is limited by its second section, which provides:

Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Thus, the ECHR considered four questions in reaching its conclusion: (1) whether the ban actually interferes with Şahin’s right to freedom of religion under Article 9; (2) whether the ban is “prescribed by law”; (3) whether the ban pursues a legitimate aim; and (4) whether the ban is “necessary in a democratic society” within the

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133 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, done Mar. 20, 1952, Europ. T.S. No. 9 [hereinafter Protocol] (“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”).
134 See Şahin, No. 44774/98, para. 116.
135 Convention, supra note 2, arts. 8(1) (“Everyone has the right to respect for his private and family life, his home and his correspondence.”), 10(1) (“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”).
137 See id. para. 115.
138 Id. paras. 116-17.
139 Id. para. 66.
140 Id.
141 Convention, supra note 2, art. 9(2).
meaning of Article 9(2). The ECHR quickly dispensed with the question of whether the ban interferes with Şahin’s freedom to exercise her religious faith under Article 9. The court did not decide whether Şahin’s choice to wear an Islamic headscarf actually fulfilled a religious duty. Instead, the court assumed that a woman’s decision to wear a headscarf may be considered an act of obeying a religious precept of Islam and thus a manifestation of her desire to comply with Islamic faith. Although the ECHR did not determine whether or not the headscarf is a requirement of Islam, it proceeded on the assumption that the Turkish regulation interferes with Şahin’s desire to practice her religion. Once the ECHR recognized this potential governmental interference with a right protected by Article 9, it then analyzed the three remaining questions to determine whether Turkey had the right to interfere with Şahin’s religious practice.

With respect to the second question, the ECHR concluded that the university’s headscarf ban is indeed prescribed by law, both because the ban is accessible to the people concerned and because its effects are sufficiently foreseeable. Moreover, the ECHR found that the Turkish Higher Education Act and the Turkish Constitutional Court ruling that declared headscarves in universities contrary to the Turkish Constitution are a sufficient domestic legal basis for the ban. Additionally, the ECHR reasoned that the Turkish Supreme Administrative Court had held, “many years prior” to the Constitutional Court’s judgment, that Islamic headscarves were incompatible with Turkey’s “fundamental principles.”

The ECHR answered the third question, whether the headscarf ban pursues a legitimate aim, in the affirmative as well. The court held that the Turkish headscarf ban “primarily pursued” the legitimate government aims of protecting the rights of others and of protecting public order. According to the Convention, a law that restricts religious practice has a legitimate aim if it is implemented “in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” Şahin herself conceded that the headscarf ban “could be regarded as compatible” with the Turkish government’s aims of

\[142\] Şahin, No. 44774/98, para. 67.
\[143\] Id. para. 71.
\[144\] Id.
\[145\] See id.
\[146\] See id. para. 81.
\[147\] The Court specifically based its decision on section 17 of the Act, finding that the ban had “some basis in domestic law.” See id. para. 78. According to the Court, judge-made law is a valid source of law in Turkey. Id. para. 77.
\[148\] See id. para. 78; supra note 90 and accompanying text.
\[149\] See Şahin, No. 44774/98, para. 84.
\[150\] Convention, supra note 2, art. 9(2).
“maintaining public order in the universities, upholding the principle of secularism, and protecting the rights and freedoms of others.”

In the fourth and final step of its analysis, the ECHR concluded that the headscarf ban’s interference with Article 9 religious rights does not violate the Convention because the ban is “necessary in a democratic society.” The court found that the government’s interference was supported by relevant and sufficient reasons and was proportionate to the aims it pursued. After examining the headscarf ban in Turkey’s specific legal and social context, the ECHR concluded that the ban is based on the principles of secularism and equality, two principles it found “necessary for the protection of the democratic system in Turkey.” Overturning the headscarf ban in universities would thus significantly hinder Turkey’s ability to preserve five separate state interests rooted in these principles: secularism itself, the rights and freedoms of others, maintenance of the public order, principles of plurality, and gender equality.

The ECHR’s necessity analysis began with the premise that “the principle of secularism in Turkey is undoubtedly one of the fundamental principles of the State, which are [sic] in harmony with the rule of law and respect for human rights.” The Turkish Constitutional Court interprets secularism as “the guarantor of democratic values, the principle that freedom of religion is inviolable—to the extent that it stem[s] from individual conscience—and the principle that citizens are equal before the law.” The government instituted the headscarf ban based on its belief that allowing women to wear headscarves in universities would be granting a privilege for one religion and would thus prevent the State from being neutral—an integral part of secularism. Accordingly, the ECHR concluded that the Constitutional Court’s interpretation of secularism is “consistent with the values underpinning the Convention,” and therefore that upholding secularism is “necessary for the protection of a democratic system in Turkey.”

The ECHR further reasoned that the ban is acceptable because permitting headscarves in universities might infringe on the rights and freedoms of others. Describing the headscarf as a “powerful
external symbol," the court expressed concern about the headscarf's potential proselytizing effect on those who do not wear it. The Turkish government, as well as the ECHR, views the headscarf as a "religious symbol [that] has taken on political significance in Turkey in recent years" against a background of "extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts." Thus, in the interest of protecting the freedom of others, the court concluded that government regulations, such as the headscarf ban, that help prevent religious fundamentalists from exerting pressure on those who do not practice their religion, can be justified under the Convention.

Relatedly, the ECHR noted that state universities may restrict the place and manner of expression of religious rites and symbols when the restriction is aimed at maintaining public order and safety. Due to the rise of fundamentalist groups and their use of the headscarf as a political symbol, the ECHR also found that restricting these symbols furthered "a pressing social need" to maintain public order.

The ECHR additionally found that the university headscarf ban was necessary "to reconcile the interests of the various groups and ensure that everyone's beliefs are respected." The court implied that upholding the rights and freedoms of others and maintaining public order and safety would preserve pluralism in the university.

Finally, the ECHR assessed the headscarf ban in relation to Turkey's protection of women's rights, noting that gender equality is one of the "key principles underlying the Convention" and a goal for all Convention signatories. Deferring to the Constitutional Court's interpretation of the Turkish Constitution, the ECHR implicitly concluded that allowing women to wear the Islamic headscarf in universities violates gender equality in Turkey. The ECHR reached this conclusion in part because it found it hard to reconcile the Islamic headscarf, which "appeared to be imposed on women by a precept laid down in the Koran," with gender equality.

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161 See id. para. 98, 108.
162 Id. paras. 108–09.
163 Id. para. 99.
164 See id.
165 See id. para. 109. The ECHR did not separate its analyses of "violating the rights and freedoms of others" and "maintaining the public order and safety"; however, for the sake of convenience, this Note analyzes these issues separately.
166 Id. para. 97.
167 See id. para. 109.
168 See id. para. 107.
169 The court referenced gender equality three times in its analysis of the headscarf ban. See id. paras. 98, 107, 110.
170 See id. para. 98.
III
EVALUATING THE ECHR’S DECISION

The ECHR’s ruling is incorrect on several legal grounds. First, the decision gives too much deference to the Turkish Constitutional Court. Although the ECHR has interpreted the Convention to grant a certain margin of appreciation to individual nation-states, the ECHR is severely undercritical of Turkey’s self-proclaimed interpretation of secularism, as well as the government’s view of the headscarf’s threat to secularism. Second, the ECHR’s review of Turkey’s specific historical, social, and legal context is incomplete and unsophisticated. The ECHR ignores the Turkish government’s role as a micromanager of religion and fails to thoroughly analyze the headscarf law and related Turkish constitutional law. Third, the ECHR incorrectly applies its own precedent in arguing that the headscarf violates the rights of others.

In addition to these legal shortcomings, the ECHR appeared to be motivated by political fears and social concerns rather than rational legal arguments. The court may have been influenced by its own feelings about the symbolism of the headscarf and its post-September 11 fears of fundamentalist Islam. While the court presumably had the best interests of both secular and religious women in mind, this decision will have adverse effects on human rights, especially the rights of women, in Turkey and in the rest of Europe.

A. Acting Contrary to the Goals of the Convention

1. The Margin of Appreciation

Admittedly, due to political considerations, the provisions in the Convention are arguably the “lowest common denominator of rights” acceptable to the Convention’s drafters. During the Convention drafting committee sessions, the drafters extensively discussed possible limitations to what eventually became Article 9. Interestingly, even in the 1950s when Turkey began to significantly ease up on Atatürk-era religious restrictions, Turkey fought to limit Article 9’s impact on freedom of religion, arguing that certain restrictive legislation concerning Muslim institutions was necessary in Turkey in the inter-

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171 See id. para. 100.
174 See supra discussion accompanying notes 46–49.
ests of "cultural recovery." Despite protests from the United Kingdom that allowing Turkey to keep legislation that contradicted the Convention would be illogical, the drafters incorporated Turkey’s needs into the Article 9(2) limitations clause. This lowest common denominator policy was later extended by the margin of appreciation doctrine, which grants states varying levels of deference when they interfere with Convention rights.

Despite this deference to state decision-making, Article 9(2) still requires that a state’s interfering legislation be “necessary in a democratic society.” While the national authorities “make the initial assessment of the ‘necessity’ for an interference,” ultimately “their decision remains subject to review by the Court for conformity with the requirement of the Convention.” The ECHR may choose from various standards of review to evaluate the state’s initial assessment of necessity, depending upon factors such as the seriousness of the infringement, the position of the applicant, and the nature of the right. If the court chose to apply a strict scrutiny standard, the court could assess the “necessity” according to its own criteria and judgment.

The Şahin Court chose not to adopt a strict scrutiny standard. Instead, the court concluded that Turkey alone should decide what is “necessary,” reasoning that “the national authorities are in principle better placed than an international court to evaluate local needs and conditions,” and so “the role of the Convention machinery is essentially subsidiary.” The court asserted, “Where questions covering the relationship between State and religions are at stake . . . the role of the national decision-making body must be given special importance.” The court thus specifically granted the State additional def-

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175 See Evans, supra note 173, at 269. Turkey, as well as Sweden, offered several amendments to limit the scope of religious freedom in the Convention. See id. at 267–68. According to Evans, the “entire point” of one of the proposed amendments “was to allow the continuation of a state of affairs that was considered to be unreasonable but necessary . . . . This clearly contemplates the continuation of discriminatory practices.” Id. at 268.

176 Id. at 270–72. Once the United Kingdom proposed to permit reservations to the Convention instead of allowing such extensive limitations, debate shifted focus to the proposed reservations and debate about Article 9(2) essentially ceased. See id.


178 See id.

179 Convention, supra note 2, art. 9(2). In a further concession to Turkey, the interference need not be “reasonable,” only “necessary.” See Evans, supra note 173, at 269.


181 See id.; Evans, supra note 173, at 321.

182 Van Dijk & Van Hoof, supra note 1, § 8.8.3, at 540.

183 Şahin, No. 44774/98, para. 100.

184 Id. para. 101.
ference where religious symbols in teaching institutions are involved, reasoning that there is no European consensus regarding the requirements for protecting the rights of others or public order. Yet after asserting the lack of any cohesive European stance on religious expression as a justification for deferring to Turkey's interpretation of "necessary," the court weakly admitted that it "does not exclude European supervision, especially [when] such regulations . . . entirely negate the freedom to manifest one's religion or belief." The ECHR's reluctance to strictly scrutinize Turkey's assessment of the necessity of the headscarf ban merely because religious symbols are involved is unsettling. Although admittedly the court generally tends to be more deferential with Article 9 judgments than other Convention rights, the court should feel fully capable of limiting Turkey's margin of appreciation and making a determination based on the relevant facts of the case. This is true even in cases like Şahin's, where the state's infringing regulation arguably does not "entirely" negate the freedom to manifest her religion. Moreover, the lack of a European consensus on religious expression should not preclude the ECHR from scrutinizing the acceptable bounds of state interference with religious expression.

2. Not All Secularism Is Created Equal

The ECHR was also too deferential to Turkey's assertion that the headscarf ban is necessary to uphold the principle of secularism. Although most democratic societies in Europe do not rely on secularism to define the boundaries of their democratic systems, the ECHR defends the importance of secularism in Turkey, claiming the "principle may be regarded as necessary for the protection of the democratic system in Turkey." While the court was correct in recognizing the importance of the concept of secularism to Turkish history and law, it did not critically examine Turkey's interpretation of secularism.

The problem lies in how the ECHR itself viewed secularism: a static political-science theory much like federalism or parliamentarism. The Şahin Court premised its analysis on its previous conclusions that "secularism in Turkey is undoubtedly one of the fundamental principles of the State, which are [sic] in harmony with

\[185 \text{ See id. para. 102.} \]
\[186 \text{ Id. (emphasis added).} \]
\[188 \text{ The French principle of laïcité is similar to Turkey's secularism. See T. Jeremy Gunn, Religious Freedom and Laïcité: A Comparison of the United States and France, 2004 BYU L. Rev. 419, 428.} \]
\[189 \text{ Şahin, No. 44774/98, para. 106.} \]
\[190 \text{ See supra Part I.} \]
the rule of law and respect for human rights.” Armed with this premise, the court then essentially assumed that any action Turkey takes to limit religious freedom in the name of secularism must be in harmony with human rights, since secularism—as an element of democracy—is itself in harmony with human rights. Aside from the obvious consideration of Turkey's history of questionable human rights practices, this assumption is unwarranted because the way a country defines secularism constantly changes and can be interpreted in drastically different ways—as Turkish history itself has shown. Consequently, simply because the ECHR has found that Turkish secularism is in harmony with the Convention as applied in the specific contexts of previous cases, such as the Refah Partisi case, the Court should not assume a fortiori that any Turkish regulation cloaked in the language of secularism is always in harmony with human rights. Instead, Turkey's secularism should be reviewed anew each time a question involving a potential human rights violation arises, because a new restriction in the name of secularism might not be compatible with human rights principles.

Yet any analysis of this kind is noticeably absent from the ECHR's opinion; the ECHR merely reiterates the Turkish Constitutional Court's holding and unquestioningly accepts it at face value. The ECHR never independently analyzed Turkey's Constitution or critically inquired into the basis of the headscarf's incompatibility with secularism—an analytical flaw particularly bothersome considering that the founding father of Turkish secularism believed the headscarf did not conflict with the principle of secularism and that Turkey did not institute a headscarf ban until the 1980s. Thus, the ECHR could have found the Turkish Constitutional Court's interpretation of secularism—one that denies a right to an individual—a violation of human rights, while simultaneously upholding the importance of secularism in Turkish democracy.

191 Şahin, No. 44774/98, para. 99.
193 See supra Part 1.B.
194 See infra notes 282–90 and accompanying text.
195 See Şahin, No. 44774/98, paras. 105–06.
196 See supra notes 36–40 and accompanying text.
197 See supra notes 87–89 and accompanying text.
B. An Incomplete and Superficial Review of Turkey’s Social and Legal Context

1. Turkey’s Questionable Secularism and Democracy

In its reasoning for upholding Turkey’s headscarf ban, the ECHR heavily emphasized the country’s commitment to upholding the principle of secularism in the interests of democracy. Some scholars refer to Turkey as the only Islamic country in the world that is a secular democracy. But despite Turkey’s self-proclaimed need to uphold secular democracy, Turkey is arguably neither secular nor a democracy. Since Evren’s military coup in 1980, the military, which is not elected, democratically or otherwise, has been significantly involved in both regulating and promoting religion within the country. The U.N. special rapporteur on the elimination of all forms of religious intolerance even concluded in his 2001 report on Turkey that “Islam is treated as if it were a ‘State affair.’” Unbeknownst, or at least of no concern, to the ECHR, Turkey has once again become a theocracy and the government imposes its own religion on Turkish society: Kemalist Islam.

Turkey’s Kemalist Islam is unlike the Sharia-driven theocracy that Atatürk ousted with the Ottomans. Rather, the new theocracy is loosely based on Atatürk’s Kemalism, but also incorporates Islam when it is politically expedient to do so. The military uses its Kemalist-Islam-driven secularism to retain political control for itself and other so-called secularists. But the ECHR’s superficial review of the Turkish social context unfortunately overlooks the substantial influence of the Turkish military and its hypocritical concept of secularism.

Had the ECHR satisfied its duty under the Convention and fully examined Turkish history, it would have discovered the following: After acquiring complete control of the Turkish government following the 1980 military coup, Evren and the military introduced an interpretation of secularism and a series of restrictions on religious rights that simultaneously used Islam to its political advantage and severely restricted individuals’ rights to exercise their Islamic faith. In response to the pre-coup religiously motivated violence and political polarization, the secular-minded Evren ironically made Islamic study compulsory in schools soon after he assumed control of the govern-

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198 See supra Part III.A.2.
200 See id.
201 See supra Part I.B; see also FEROZ AHMAD, THE MAKING OF MODERN TURKEY 1-14 (1993) (discussing the preeminent role of the military in Turkish government).
202 Sugden, supra note 187.
203 See supra Part I.B.
The government even oversees this Islamic religious education through the Directorate of Religious Affairs (Diyanet). The 1982 Turkish Constitution itself even includes a provision detailing the government's role in promoting religion: "Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools." Evren intended to use a state-approved version of Sunni Islam as a political tool "to steal the thunder of the obscurantist hocas who would otherwise have a clear field with their fundamentalist vision of Islam."

In addition to regulating Islamic education, the Diyanet is also responsible for regulating Turkey's 75,000 mosques and employing imams, who are considered civil servants in Turkey. The government also dictates the contents of the imam's sermons at Friday prayers, "sometimes down to the last word." Furthermore, only the Diyanet is authorized to provide any Koran courses outside of the school setting.

Non-Muslim minorities are also heavily regulated by Turkey's "secular" bureaucracy. The General Directorate for Foundations (Vakiflar) is responsible for regulating non-Muslim religious groups and Muslim charitable religious foundations such as schools, hospitals, and orphanages. Places of worship must register and abide by specific zoning regulations. Police have occasionally barred religious groups from holding unauthorized religious services, and prosecutors have sometimes even brought charges on these grounds.

But the ECHR does not discuss—or even reference in passing—these questionably theocratic practices. One scholar argues that a state showing no interest at all in the wearing of headscarves would be more consistent with secularism and secular democracy than a state taking a formal position on whether a religious symbol such as the headscarf is appropriate in universities. Unfortunately, the court

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204 See Pope & Pope, supra note 18, at 318.
207 Pope & Pope, supra note 18, at 156; see Freedom Report, supra note 205.
208 See Freedom Report, supra note 205.
209 Pope & Pope, supra note 18, at 317.
210 See Freedom Report, supra note 205.
211 See id.
212 See id.
213 See id.
failed to recognize this secularist double standard: The military has introduced a new theocracy based on a Kemalistic version of Islam, but at the same time will not permit the headscarf under the guise of maintaining a secular democracy.

The role that Kemalistic Islam plays in Turkish society should have significantly influenced the method the ECHR chose to analyze Şahin’s Article 9 rights. Article 9 rights are comprised of two parts: “the sphere of personal beliefs and religious creeds, i.e., the area which is sometimes called the forum internum,” and the freedom to manifest those beliefs and creeds. The court is eager to point out that Article 9 religious rights are limited. But only the freedom to manifest one’s beliefs is subject to the restrictions in Article 9(2); the “inner” freedom of religion of the forum internum, on the other hand, “is guaranteed in the Convention without qualification.” The ECHR has found that the forum internum provision of Article 9 protects the individual against religious indoctrination by the state. The Convention implicitly guarantees that a person may not be subjected to actions designed to change her thought processes or her personal opinions. Furthermore, a person cannot be subjected to sanctions for holding any religious view or belief.

While there are clearly two parts to Article 9, the ECHR examined only Şahin’s right to manifest her religious beliefs without ever considering how the state’s ban, motivated by Kemalism, possibly violates Şahin’s forum internum. The headscarf ban might in fact be nothing more than the Turkish secularists’ attempt to indoctrinate traditional Muslim women and convert them to the state-sponsored version of Kemalism. By imposing this ban, the government arguably forces Muslim women who wear the headscarf to choose which version of Islam to follow: one that traditionally requires

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216 See Leyla Şahin v. Turkey, No. 44774/98, para. 97 (Eur. Ct. H.R. June 29, 2004), http://cmiskp.echr.coe.int/tpk197/search.asp?skin=hudoc-en (search by Application Number). Thus, the court begins its analysis of “necessary in a democratic society” not with the importance of freedom of religion but rather with the notion that the freedom of religion can be curtailed.
217 VAN DIJK & VAN HOOF, supra note 1, § 9.1, at 541.
218 See Shaw, supra note 215, at 456.
219 See VAN DIJK & VAN HOOF, supra note 1, § 9.1, at 541-42.
220 See id.
221 See discussion supra Part II.B.
222 The Turkish government has repeatedly stated that the headscarf is contrary to its goal of unifying the populace. See, e.g., Leyla Şahin v. Turkey, No. 44774/98, paras. 34, 36 (Eur. Ct. H.R. June 29, 2004), http://cmiskp.echr.coe.int/tpk197/search.asp?skin=hudoc-en (search by Application Number). The government has a clear preference for an Islam in which women do not wear headscarves.
them to wear a headscarf or one endorsed by the state, which views
the headscarf as contrary to the principles of secularism. Because Ar-
ticle 9 potentially confers on Turkish women the right to make this
choice independently, and thus the right to reject the "secular" state's
preferred religion, the court should have assessed whether banning
headscarves in universities in the name of secularism is just a pretext
for punishing women for their religious convictions and intruding
into their forum internum.

2. Was the Ban Really Prescribed by Law?

Although the ECHR requires only a very low threshold of "some
basis in domestic law" to find that a governmental interference is "pre-
scribed by law," a brief inspection of the Şahin Court's superficial
review of Turkish law is warranted. The court established that
"[j]udge-made law is regarded as a valid source of law under Turkish
Law." Nonetheless, the ECHR actually relied on only the Constitu-
tional Court's dicta as authority to uphold the ban.

Yet the status of Constitutional Court dicta is not as clear as the
ECHR purports it to be. Even a cursory look at the Turkish Consti-
tution shows that the Constitutional Court has no power to issue bind-
ing dicta. According to Article 153:

In the course of annulling the whole, or a provision, of laws or
decrees having the force of law, the Constitutional Court shall not
act as a law-maker and pass judgment leading to new
implementation.

The Supreme Administrative Court, the Danıştay, has similarly held
that the scope of the Constitutional Court's judicial review powers is
not as wide as the Constitutional Court would hope. According to the
Danıştay:

'It is indubitably clear that . . . a judicial body applying to a case a
rule in law which remains in validity and has not been struck down
by the Constitutional Court is not bound by the interpretation given
by the Constitutional Court in its own interpretation of the rule in
law.'

The Danıştay's opinion is significant because it limits the Constitu-
tional Court's self-proclaimed power to create legally binding law
through its dicta to apply only when the Constitutional Court strikes

223 See id. para. 74.
224 Id. para. 77.
225 See supra notes 109, 147 and accompanying text.
226 See Şahin, No. 44774/98, para. 78.
227 TURK. CONST. art. 153.
228 HUMAN RIGHTS WATCH, supra note 33, at 28 n.65 (quoting Danıştay [Council of
down a law. Since the Constitutional Court actually upheld section 17 of the Higher Education Act, its dicta might not be binding. In other words, if the ECHR found the headscarf ban to be prescribed by law based primarily on the Constitutional Court’s dicta, the headscarf ban may have no legal basis at all.

Furthermore, the ECHR does not identify this potential conflict between two of Turkey’s high courts: the Constitutional Court and the Danıştay. Although the ECHR correctly acknowledged the Danıştay’s initial judgment regarding the headscarf, it failed to mention the Danıştay’s most recent holdings, which permitted certain types of headscarves based on basic individual liberties granted by the Constitution. Thus, while the Constitutional Court unambiguously held that headscarves are incompatible with the Constitution, the Danıştay’s decision is not as clear and may be contrary to that of the Constitutional Court. Because the Danıştay is Turkey’s highest court for controversies arising from governmental action, the ECHR should have analyzed the Danıştay’s opinion on the legality of the headscarf ban, instead of concentrating solely on the Constitutional Court’s potentially conflicting analysis of the ban.

Although admittedly a minor point, the ECHR also should have taken at least a cursory look at the historical and social context in which the 1982 Constitution was created. Even if the Constitutional Court had correctly assumed its power to create binding law through dicta, the ECHR should have recognized the source of the Constitutional Court’s power: a Constitution of questionable legitimacy, created as a result of a military coup. According to one scholar, the 1982 Constitution was “designed without the full participation or cooperation of all the major political forces in the country. Thus, [it] contributed mainly to a crisis of political legitimacy.”

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229 See supra notes 111–13 and accompanying text.
230 See supra notes 109–10 and accompanying text.
231 See Şahin, No. 44774/98, para. 34. The Danıştay upheld the headscarf ban in lecture halls because “wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic.” Id. (quoting the Danıştay) (emphasis added); see supra note 90 and accompanying text.
232 See supra note 104 and accompanying text.
233 See supra notes 99–105 and accompanying text.
234 See supra note 90.
235 See discussion supra Part I.B.1.
236 Ersin Kalaycioglu, Constitutional Viability and Political Institutions in Turkish Democracy, in DESIGNS FOR DEMOCRATIC STABILITY STUDIES IN VIABLE CONSTITUTIONALISM 179, 187 (Abdo I. Baaklini & Helen Desfosses eds., 1997). The NSC charged a 160-member constitutional assembly with responsibility for drafting the Constitution; however, the NSC retained complete control over the project since each member was directly or indirectly chosen by the NSC and the NSC reserved a final say over the completed product. See Özbudun, supra note 26, at 25.
91.3% of the voting population voted in favor of this vague new constitution in the referendum election, General Evren had prevented anyone from speaking out against it.\(^{237}\) Without any criticism or detailed analysis of the proposed Constitution, the public may have simply been unaware of the potential restrictions on religious liberties that the new Constitution imposed.\(^{238}\) Thus, with no clear constitutional legitimacy, the ECHR should have viewed the Constitutional Court’s self-proclaimed constitutional power to formulate binding laws with far more skepticism than it did.

C. Expanding and Misapplying Prior Court Precedent

The ECHR also based its decision to uphold the Turkish headscarf ban in part on the premise that women who wear Islamic headscarves in universities violate the rights of others and will possibly disrupt the public order.\(^{239}\) The Şahin Court’s reasoning in support of this conclusion, however, is vague and does not comport with previous ECHR case law. The closest the ECHR ever came to explaining how a woman wearing a headscarf violates the rights of others or upsets public order is in its overbroad recognition that the headscarf is “a symbol, which is presented or perceived as a compulsory religious duty”\(^{240}\) and that “extremist political movements” in Turkey seek to impose such religious symbols on Turkish society at large.\(^{241}\) Although the court never clearly articulated its reasoning, it appears it has two concerns with women wearing headscarves in universities: (1) the effect the headscarf might have as a symbol for encouraging fundamentalist Islamic movements\(^{242}\) and (2) the possible proselytizing effect it may have on other students.\(^{243}\)

To determine whether a woman’s choice to practice her religion by wearing a headscarf violates the rights of other students, the ECHR should normally ask, consistent with precedent, whether limiting the rights of one individual is proportionate to the goal of protecting the rights of other individuals.\(^{244}\) The very nature of denying one individual’s right in order to protect the rights and freedoms of another is somewhat troubling, but sometimes necessary. The key to determin-

\(^{237}\) See Pope & Pope, supra note 18, at 150.

\(^{238}\) Another possible reason for the overwhelming support the Constitution received may be that the public believed a vote for the Constitution was a vote to oust military rule and to reestablish a civilian government. See Ahmad, supra note 201, at 187.


\(^{240}\) See id. para. 108.

\(^{241}\) See id. para. 109.

\(^{242}\) See supra notes 162–63 and accompanying text.

\(^{243}\) See supra note 161 and accompanying text.

\(^{244}\) See Van Dijk & Van Hoof, supra note 1, § 9.6, at 555.
UNVEILING THE REAL ISSUE

ing when one right should trump another is by striking a balance between the rights, after taking into account the context in which the two rights conflict.\textsuperscript{245} The court may also examine the nature of the relationship between the parties to assist in its balancing analysis. Specifically, the court may apply a proselytizing-effect standard to determine whether the action of one party in the relationship is proselytism and the other party is susceptible to coercion.\textsuperscript{246}

But the \textit{$\text{\c{S}}$ahin} Court never balanced the rights of women to manifest their religion by wearing headscarves against the rights of other students to avoid proselytism. Even taking into account the possible coercive nature of the headscarf, the court furthermore misapplied its previous ruling in \textit{Dahlab v. Switzerland}\textsuperscript{247} when applying the proselytizing-effect standard. In \textit{Dahlab}, the ECHR upheld a Swiss headscarf ban prohibiting primary school teachers from wearing headscarves in class, citing the "proselytizing effect" a teacher can have on "very young children" even though the teacher did not discuss religion or the headscarf with her students.\textsuperscript{248} The \textit{$\text{\c{S}}$ahin} Court found it easy to determine that the headscarf in $\text{\c{S}}$ahin's situation violated the rights of others, simply because the ECHR had previously held that the Islamic headscarf violated the rights of others in another situation.\textsuperscript{249}

The Court's prior \textit{Dahlab} ruling, however, can easily be distinguished on its facts. In \textit{Dahlab}, primary school teachers were banned from wearing headscarves in the classroom.\textsuperscript{250} The atmosphere in the primary school setting in which Dahlab wore her headscarf differs markedly from the atmosphere of the university in which $\text{\c{S}}$ahin wore hers. $\text{\c{S}}$ahin, a medical student herself, was not likely to exert the same coercive pressure on her classmates or professors that a teacher does.

\textsuperscript{245} See \textit{Evans}, supra note 173, at 328.
\textsuperscript{246} See \textit{Ovey \& White}, supra note 5, at 266–67. For example, in \textit{Kokkinakis v. Greece}, the ECHR found that the Greek government had violated Article 9 because it was unable to prove that the applicant attempted to proselytize through improper means that violated Greek law. See 260 Eur. Ct. H.R. (ser. A) at 45–46 (1993) (noting that the applicant went door to door trying to teach people about Jehovah's Witness and limiting the Greek law by requiring the proselytizing to be done through improper means, such as brainwashing or threats, in order for it to be banned). Conversely, applicants' proselytizing in \textit{Larissis v. Greece} was contrary to state interests because of the inherent coercive nature found in "hierarchical structures" like the military, as well as the applicant's repetitive and coercive method of seeking out religious discussion with the victim. 1998-I Eur. Ct. H.R. 362, 380 (explaining that applicants approached the victims "on a number of occasions in order to persuade them to convert and to visit the Pentecostal Church" and that one victim stated that he "felt obliged to take part in the discussions because the applicants were his superior officers").
\textsuperscript{250} See id. para. 86.
on her more impressionable school-aged pupils. Furthermore, if any of Şahin’s peers or professors believed that she was attempting to coerce or intimidate them, they had the capacity to seek assistance from law enforcement or university officials. The Turkish government offered the ECHR no evidence that any women wearing headscarves had, in fact, proselytized or coerced any other student in the university either before or after the ban was imposed.

D. The Court’s Not-So-Hidden Political Agenda

1. Gender Equality and Defining Acceptable Islamic Practice

   a. The Court’s Negative Conception of the Headscarf

   The Şahin decision also appears to be improperly motivated by the ECHR’s own political agenda. First, the court’s opinion may have first been influenced by its own opinions and stereotypes of the Islamic headscarf in general. Second, the court decided to uphold the ban on grounds that the headscarf violates gender equality. According to one scholar, “The veil-as-a-symbol-of-Muslim-woman’s-oppression discourse has its roots in a Eurocentric vision of the world that would have the West as superior and the non-West as inferior.” Further influenced by images in the media of state-sponsored forced veiling in Iran after the 1979 Revolution and by the Taliban in Afghanistan, Western popular culture arguably sees coercion as the only possible reason why a Muslim woman would ever wear a headscarf. Many of those influenced by the Iranian Revolution interpret the resurgence of veiling in 1980s Turkey as a “symbol of women’s acceptance of obedience to men.” They are concerned that ending the Turkish ban would seriously threaten the freedoms that women have

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251 While the “hierarchical structures” that concerned the Larissis Court—specifically the power and impression a military superior has over his subordinates—is clearly present in the teacher-student relationship in Dahlab, it is notably absent among the students in Şahin. See supra note 246.
252 See Şahin, No. 44774/98, paras. 86, 96. The Turkish government argued that some students “complained of pressure” from students associated with fundamental religious movements. See id. para. 96. But the state did not detail who these fundamentalist students were or describe the type of pressure the other students felt. The pressure could have been nothing more than just some student’s feelings of guilt or unease at the sight of a headscarf.
253 See supra note 162 and accompanying text.
254 See supra notes 168–70 and accompanying text.
256 See Bullock, supra note 255, at 116.
257 See Göle, supra note 255, at 86.
won since Atatürk's secular revolution. Many supporters of the Turkish ban also view the headscarf as oppressive, reasoning that women who "choose" to wear the headscarf must have been brainwashed by their families and their religion into thinking that they are required to wear it.

The ECHR's opinion seems significantly influenced by this Western view of the headscarf. Turkey's argument to the ECHR alluded to images of the veil imposed by the Taliban and Iranians. Although the ECHR's task was solely to determine if the Turkish headscarf ban was necessary in a democratic society, the court used this case as an opportunity to propagate its view of the oppressive and inequitable nature of the Islamic headscarf. Without stating so overtly, the ECHR hints that the headscarf ban is necessary because the Islamic headscarf is not generally consistent with gender equality. Mentioning gender equality or general principles of equality no less than six times, the Şahin Court adopted a paternalistic approach and reached a result it believed would improve women's rights and equality in Europe. But simultaneously, the court's analysis overstepped its authority by setting substantive policy regarding acceptable religious practice for Islam. In the court's mind, headscarves do not fit within the boundary of acceptable religious practice, whether they are found in universities or otherwise.

Indeed, several of the Turkish government's arguments in defense of its headscarf ban appeal to the court's concern about gender equality issues. The State argued that the ban is necessary in a democratic society because the headscarf "constituted a threat to the rights of women"; that the ECHR had previously found other provisions of Sharia law contrary to the Convention, and thus this provision is as well, a fortiori; and that conservative female medical students

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258 See Human Rights Watch, supra note 33, at 37.
259 See Bullock, supra note 255, at 66.
260 See Leyla Şahin v. Turkey, No. 44774/98, para. 92 (Eur. Ct. H.R. June 29, 2004), http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by Application Number). Although completely unrelated to the kind of headscarf Şahin wished to wear in the university, the government discussed different types of headscarves and argued that it is "difficult to reconcile all those different forms of dress derived from the same religious rule with the principle of neutrality in State education." Id.
261 See id. paras. 98–110.
262 See id. para. 98 ("gender equality"), 104 ("equality"), 105 ("principle that citizens are equal before the law"), 107 ("gender equality"), 108 ("the rights of women"), 110 ("equality before the law of men and women").
263 See id. para. 107 ("Gender equality—recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe—was also found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution." (citations omitted)).
264 Id. para. 93.
265 See id. para. 94.
who wear the headscarf will undoubtedly engage in gender discrimination when they become practicing doctors.\footnote{266 See id. para. 95.}

 While Turkish law generally does promote gender equality,\footnote{267 See, e.g., TURK. CONST. art. 10 ("All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.").} the government's current concern that the headscarf is incompatible with its interpretation of gender equality is nothing more than a pretext.\footnote{268 The State's gender equality arguments were some of the last arguments the State made. See Şahin, No. 44774/98, paras. 90–96. Conversely, the ECHR first mentioned its gender equality concerns in the second paragraph of its reasoning. See id. para. 98.} If a significant purpose of the headscarf ban was to promote gender equality, this regulation is grossly underinclusive. The government could have easily imposed a more extensive ban on the headscarf throughout Turkish society—not just in government settings and schools—in the name of protecting women's rights and the Turkish Constitution, if it was actually concerned that the headscarf violated principles of gender equality.

 Even though Turkey's supposed concern with gender equality was merely a subsidiary argument, the ECHR seemed almost too eager to address this issue. The ECHR, however, never qualified its current assessment of the headscarf's incompatibility with women's rights with any reference to Turkey's specific legal and social context. Before the court even began its discussion of necessity or secularism, it asserted that the headscarf as "a precept laid down in the Koran [is] hard to reconcile with the principle of gender equality."\footnote{269 Id.} Thus, even before the ECHR undertook its analysis of whether Turkey's interference with religious expression is relevant, sufficient, and proportionate to the aims pursued,\footnote{270 See id. para. 103.} the court already believed that conservative Islam is not in line with gender equality. But the ECHR's stereotypes about the Islamic headscarf are not necessarily true; there are many reasons other than coercion that women choose to wear headscarves.\footnote{271 See BULLOCK, supra note 255, at 85–115 (describing six noncoercive reasons for wearing an Islamic headscarf, including revolutionary protest, political protest, religious reasons, access to the public sphere, expression of personal identity, and custom).}

### b. Headscarf Bans: The Real Threat to Gender Equality

The most obvious effect of the ECHR's ruling is to effectively preclude an entire class of women from pursuing higher education in Turkey. Although the ECHR may have intended to protect women, the court did not adequately anticipate the repercussions of its actions. The court correctly implied that some women wear a headscarf
as a result of coercion, fear of physical violence or the desire to appease their families and close-minded fundamentalists. Perhaps the court reasoned that if it upheld the ban on headscarves, women would then have a valid legal excuse not to wear them and the coercive pressures would cease. But the court did not think things through. If in fact the community that is harassing these women is as persuasive and influential as the court suggests, then surely it can be just as persuasive and influential in preventing these women from attending universities at all. The same so-called coercive extremist will still frame the issue as a very simple choice: If you must go to school, wear the headscarf, but do not go to school if you cannot wear the headscarf.

Regardless of the reason, Turkish women who choose to wear the headscarf must pursue education in other countries, because the ban applies in all educational institutions in Turkey, not just in state schools. According to one estimate, the ban has denied the right to education—a right purportedly guaranteed by both the Convention and the 1982 Turkish Constitution—to approximately 2,000 female students who refuse to remove their headscarves. Turkey's current prime minister, Tecip Erdogan, sends his daughters to the United States to receive a university education in part because they choose to wear headscarves. Unfortunately, not all Turkish women are privileged enough to have opportunities to study in more tolerant countries. Like the policies of forced veiling that terrorize the women of some other Islamic countries, Turkey's ban "undercuts individual autonomy and choice, a fundamental aspect of women's rights."

If the ECHR was serious about protecting women's rights and promoting gender equality, it seems illogical to deny thousands of women a university education. If a woman is in a situation were she is pressured into wearing a headscarf, she is going to continue to wear the headscarf whether or not there is a ban on headscarves in the university. What will change, however, is her access to education.

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272 See Sahin, No. 44774/98, para. 92.
273 See Bullock, supra note 255, at 85.
274 See id. at 67.
275 See Sahin, No. 44774/98, para. 35.
276 See Protocol, supra note 133, art. 2.
277 Turk. Const. art. 42 ("No one shall be deprived of the right of learning and education.").
280 Human Rights Watch, supra note 33, at 24.
Consequently, the difference between a Turkey with and without a headscarf ban is not the number of women who wear headscarves, but rather the number of women who will receive the benefit of the higher, secular education that the Constitutional Court values so highly.

2. Politically Motivated "Islamophobia"

The ECHR seems to have been further motivated to uphold the headscarf ban by its own fears of fundamentalist Islam. Concerned about the political significance the headscarf has acquired in Turkey, the ECHR found that the government’s headscarf ban met “a pressing social need” to maintain the public order by taking a stance against extremist and fundamentalist Islam in Turkey. While the events of September 11, 2001 confirm that fundamentalist Islam can pose a severe threat to democracy and public safety, the ECHR may have been too quick to do its own part to make the world safe from Islamic extremists. In doing so, the court failed to recognize the less-than-subtle distinction between fundamentalist Islam, political Islam, and an individual’s act of practicing Islam, distinctions Turkey itself has difficulty making. Sahin may have been another step in the ECHR’s ongoing attempt to limit the dangers of extremist Islam, but unfortunately this attempt was misguided.

a. The ECHR’s Goal to Curb Fundamentalist Islam

The Court’s last attempt to limit what it believed was extremist Islam was in the Refah Partisi case. Necmettin Erbakan and his most recent Islamic party, the Welfare Party (Refah Partisi, or RP) won the parliamentary elections in 1995, with Erbakan himself becoming Prime Minister. A year later, he formed a coalition government with the True Path Party (TP). Although the Erbakan government made several attempts to lift the ban on headscarves in offices and universities, it met opposition from Turkish secularists and even from some factions within the TP. Although the coalition eventually reached a compromise to lift the ban only in universities, several ministers in the TP refused to acquiesce, believing that the HEC, not the

283 See Dokupil, supra note 20, at 109.
284 See Özdalga, supra note 27, at 47. The fact that Erbakan and Tansu Çiller, the head of the TP, who have drastically different ideologies about secularism and occupy opposing poles of the political spectrum, formed a coalition government can only be explained by the political benefits each party gained by forming the coalition. See id. at 47–48.
285 See id. at 47.
government, should deal with the headscarf issue. With an implied threat from the military that a fourth coup would oust Erbakan from power, Erbakan stepped down from his position. The Constitutional Court subsequently found that the RP’s existence violated the Constitution and banned it. The ECHR upheld the Constitutional Court’s decision to ban the RP, despite the fact that the ECHR had unanimously held in a previous ruling that Turkey could not ban the Turkish Communist Party, because such a ban violated Article 11 freedom of assembly rights.

The Turkish military is arguably justified in taking precautions against fundamentalist Islam, which it considers one of the greatest threats to national security. But fundamentalist Islam is not necessarily the same as political Islam—and the ECHR never made this distinction. If students wear headscarves in Turkish universities for political reasons, it does not necessarily mean that they are extremist fundamentalists. According to Nicole and Hugh Pope, most of the political parties closely associated with the Islamic faith consist of "law-abiding citizens who would not think of imposing their views by force." As another scholar argues, "[P]opular Islam has never seriously challenged the modern polity," and the alleged extremism "has often mistakenly been interpreted as though it constitutes a threat to the very foundations of the modern, secular polity, when, in fact, it does not."

b. The Welfare Party Ban as a Basis for the Headscarf Ban

The ECHR relied heavily on its ruling in the Refah Partisi case to justify the headscarf ban in Şahin. Although the Refah Partisi case was a freedom of association case, the Şahin Court’s freedom of religion analysis cites it four times. But relying on the Refah Partisi Court’s willingness to abridge the rights of a religious-oriented political party as a basis to limit an individual’s right to manifest her religious convictions is troubling. The Şahin Court made a connection between sup-
pressing a political party—an entity that arguably has the ability to influence the public, return Turkey’s secular laws to a Sharia-based system, and otherwise undermine democracy because of its position as a government actor—and suppressing the religious rights of a single individual. Furthermore, the court implied that Şahin and others like her choose to wear Islamic headscarves for political reasons—a theory that is unsupported by any evidence from either Turkey or the ECHR.

This connection between an Islamic extremist party and ordinary individuals is problematic. The Welfare Party may have posed a danger to the Turkish democratic system—especially because factions of that party were known extremists who openly supported a return to Sharia law in Turkey—\(^\text{295}\)—and banning it may thus have been “necessary in a democratic society.”\(^\text{296}\) Yet an individual who chooses to wear a headscarf out of personal conviction, whether affiliated with the Welfare Party or not, does not pose the same danger to democratic society. The Turkish government never provided any evidence as to how an individual’s headscarf endangers the public order nor any examples of danger that have arisen because of women wearing the headscarf.\(^\text{297}\) While the media often uses images of veiled women to evoke fears about fundamentalism and terrorism,\(^\text{298}\) many Turks oppose the headscarf not simply because of these fears, but because of a related slippery-slope argument: If the government concedes to the Islamists on any one point, such as allowing women to wear headscarves freely, the Sharia and the end of democracy in Turkey cannot be far behind.\(^\text{299}\) As one scholar noted, “They reason according to the proverb: ‘If you give the devil the little finger, he will soon take the whole hand.’”\(^\text{300}\)

The ECHR’s acceptance of this slippery-slope argument and its belief that Şahin’s headscarf was in fact politically motivated is evident in its reasoning. Turkey argued that the headscarf is part of Sharia law and thus incompatible with democracy.\(^\text{301}\) The Şahin Court all too willingly accepted this argument. Citing Refah Partisi, the ECHR reasoned that Turkey is legally authorized to ban an individual’s headscarf to counter extremist political movements.\(^\text{302}\) Yet women choose

\(^{295}\) See Dokupil, supra note 20, at 108.

\(^{296}\) See Convention, supra note 2, art. 9(2).

\(^{297}\) See Şahin, No. 44774/98, para. 86.

\(^{298}\) See BULLOCK, supra note 255, at 30.

\(^{299}\) Cf. Özdalga, supra note 27, at 37 (discussing this slippery-slope argument in the context of Friday prayers).

\(^{300}\) Id.

\(^{301}\) Şahin, No. 44774/98, para. 94.

\(^{302}\) See id. paras. 109–10.
to wear headscarves for many reasons, and assuming that Şahin or others wear it for political reasons is an oversimplification.  

E. The Court’s Counterintuitive Reasoning

1. Time and Manner Restrictions or a Full Societal Ban?

Although the Şahin Court implicitly justified the ban as proportionate to its intended goals because it is restricted in time, place, and manner, most if not all of the Turkish government’s and the ECHR’s arguments for upholding the ban can equally justify a complete national ban on the Islamic headscarf. The ECHR’s broad reasoning thus may have—intentionally or unintentionally—opened the door for the Turkish Constitutional Court to uphold an outright ban on headscarves in all public places in Turkey. The government claims that universities are special because they are hotbeds of political fundamentalism, but gives no examples other than allusions to historic violence, which was not limited to the universities. Nor does the ECHR require any such evidence from Turkey. If the government and the ECHR were legitimately concerned about fundamentalist pressures, why not apply the ban to all public areas of Turkish society?

Unfortunately, the ECHR’s reasoning upholds the headscarf ban in terms that apply not only to the university setting but also seem to justify a complete ban in Turkish society. The ECHR was more realistic in its assessment of the reach of fundamental pressures than the Turkish government: “[T]here are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols . . . .” Because mosques and private Islamic educational institutions are also regulated by the state and are thus within the “sphere of state education,” perhaps this ruling already extends to ban women from wearing headscarves in those locations as well. How much farther can the ban extend under the court’s reasoning to protect “society as a whole”?

303 See Bullock, supra note 255, at 85–87.
304 See Şahin, No. 44774/98, para. 93. The State described the ban as limited to locations that are within the “sphere of State education.” Id.
305 See supra note 66 and accompanying text.
306 If anything, the ban is more logical outside the university context. The university is a contained environment, where violence and insurgency can be closely monitored. The government would have a much more difficult time regulating religiously motivated violence on the public streets of Turkey than in well-monitored universities. Thus, the ban would be more helpful in countering extremist movements if it applied outside the university.
307 Şahin, No. 44774/98, para. 109 (emphasis added).
308 See supra notes 208–10 and accompanying text.
309 See supra note 304.
2. **Counterintuitive Interests of Pluralism**

Quite possibly the most embarrassing and poorly reasoned of the ECHR's rationales for upholding the headscarf ban is the court's goal of promoting the interests of "pluralism in universities." The court justified the limitation on a woman's right to wear a headscarf for religious reasons in universities by reasoning that "it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected." This particular reasoning for curtailting freedom is flawed on several accounts.

First, it is impossible to respect everyone's beliefs when upholding the infringement of a fundamental right. The beliefs of an entire class of women are clearly not respected by a decision that forces them to abandon either their religious convictions or their educational aspirations.

Second, it is illogical to attempt to advance the cause of pluralism by excluding an entire class of women with particular beliefs from the university system. The only atmosphere that the headscarf ban can possibly foster in the university community is a completely homogenous, secularized student body devoid of dissenting voices.

Third, it is inconsistent with the ECHR's own precedent. The Şahin Court emphasized limiting freedom of religion in order to foster pluralism, but in a prior judgment, the ECHR maintained quite the opposite position when it stated, "The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on [freedom of religion]."

**Conclusion**

 Atatürk's philosophy of secularism and the reforms he implemented concerning religious observance are still passionately debated. While the European Court of Human Rights had the opportunity to add an element of reason to the debate, it instead let its own stereotypes and fears deny the fundamental right of religious freedom to an entire group of people. But even more indefensibly, the ECHR's failure to review the Turkish headscarf ban in its social and historical context as required by the Convention indefinitely denies an entire class of women access to education.

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311  Id. para. 97.
The ECHR’s decision to uphold the university headscarf ban in Şahin represents a massive blow to freedom of religious expression in Europe. Not only is the decision contrary to the purposes of the Convention, but it also creates precedent that is likely to further restrict fundamental rights in the future. The holding acknowledges and approves of a government’s use of theocratic secularism as a weapon in the battle against Islamic fundamentalism. Whether or not the Court intended to do so, this decision also further solidifies the role of the military as an extragovernmental authority and legitimizes its constant threat of coup to retain its power.

On the whole, the ECHR’s legal reasoning is counterintuitive, circular, vague, unsupported, and plagued with shifts in scope. The court justified placing a ban on headscarves in the university setting, while its rationale could easily apply to a total ban in Turkish society. In addition to the legal inefficiencies with the court’s decision and the incomplete analysis of Turkish history, the ECHR’s decision completely glosses over the true nature of the Turkish military’s relationship with the state’s governmental organs and its questionable method of “strictly appl[y]ing the principle of secularism.”\textsuperscript{313} The court even goes so far as to awkwardly assert that excluding women who wear headscarves from higher education can actually serve the interests of plurality.\textsuperscript{314}

Despite the ECHR’s June 2004 ruling, hope is not lost for women in Turkey who believe that wearing a headscarf is a religious duty. The ECHR’s seven-person Chamber judgment is not the last word the court will have on the headscarf issue. One day after the ECHR released its judgment, Şahin applied to the Grand Chamber panel for a referral.\textsuperscript{315} On November 22, 2004, the ECHR announced that a five-person panel had accepted Şahin’s appeal and referred the case to the Grand Chamber to reevaluate—and possibly reverse—the Chamber’s legally flawed and politically motivated decision.\textsuperscript{316} Although there does not appear to be much that Turkish women who wear headscarves can do to maintain their rights, the debate is not over yet.

\textsuperscript{313} See Şahin, No. 44774/98, para. 91.
\textsuperscript{314} See discussion supra Part III.E.2.
\textsuperscript{315} See Turkish Student Slams Headscarf Ruling, supra note 278.